

The latter meaning warrants the application of the arbitration clause. (See *Toller v. Law Accident Assurance Society Ltd.*, *supra*). The defendant company relies on the second meaning. They admit the existence of the policy and are relying upon a term of it to escape liability. It is therefore fallacious to contend that the defendant company by denying liability is repudiating the policy including the arbitration clause.

The second ground was not pursued by the plaintiffs at this hearing and I take it has been abandoned. In any event that ground is without merit.

A re-assessment of the matter compels me to the conclusion that the plaintiffs have not shown sufficient reasons why it should not be referred to arbitration.

The application is therefore allowed with costs. The earlier order is set aside.

Application allowed.

Solicitors: *Donaldson & Burkinshaw; Ariffin & Ooi.*

KHO KWANG CHOON v. PHUMAN SINGH

[O.C.J. (Williams J.) October 28, 1967]
[Kuching — Civil Suit No. K. 24 of 1966]

Land Laws — Indefeasibility of title — Registered charge — Memoranda of charge held inadmissible as they were not registered in accordance with s. 3, Moneylenders Ordinance (Sarawak Cap. 114) — Rectification — Land Code (Sarawak Cap. 81), ss. 132, 134, 148 & 151.

In this case the plaintiff claimed a declaration that, certain charges registered against his land were null and void and an order for rectification of the register. In an earlier action it had been held on an application for the sale of the land that inasmuch as the memoranda of charges had not been registered in accordance with section 3 of the Moneylenders Ordinance they were inadmissible in evidence. The defendant counterclaimed for the capital sum and interest secured by the charges or in the alternative for an order that he was entitled to possession or for sale of the land charged.

Held: (1) once an interest is registered the court has no power in the absence of fraud to remove or even order the removal of the name of the proprietor of the interest and therefore in this case the court had no power to order rectification;

(2) a charge and a memorandum of charge are one and the same thing. This means that evidence which was allowed in the circumstances of this case was inadmissible and no remedy can be granted thereon. The defendant cannot therefore succeed in his counterclaim.

Cases referred to:—

- (1) *Phuman Singh v. Kho Kwang Choon* [1965] 2 M.L.J. 189.
- (2) *Bonnard v. Dolt* [1906] Ch. 740.
- (3) *Cornelius v. Phillips* [1917] A.C. 199.
- (4) *Chapman v. Michaelson* [1909] 1 Ch. 238.
- (5) *Cohen v. J. Lester Ltd.* [1938] 4 All E.R. 188.

- A (6) *Sathappa Chettiar v. Song Chwee Oon* [1939] M.L.J. 180.
- (7) *A.R. Ve. Palanisamy Servai v. S. V. Lingham* [1954] M.L.J. 145.
- (8) *Chong Cho v. Lau Kheok Chee* [1957] S.C.R. 117.
- (9) *Frazer v. Walker* [1967] 1 All E.R. 649.
- B (10) *Abirami Ammal & Anor. v. M.S.M.M. Meyappa Chettiar* [1959] M.L.J. 149.

CIVIL SUIT.

Sahathevan for the plaintiff.

Thomas for the defendant.

Cur. Adv. Vult.

- C Williams J.: The plaintiff's claim in this instance follows upon a decision in an earlier case, namely that of *Phuman Singh v. Kho Kwang Choon* ⁽¹⁾ where the same parties were involved. Briefly that case concerned an application for the sale of charged land under section 148 of the Land Code (Cap. 81 of the Laws of Sarawak). No order was made for the sale of the land because the defendant alleged that the plaintiff was a registered moneylender and that inasmuch as the memoranda of charges had not been registered in accordance with section 3 of the Moneylenders Ordinance (Cap. 114 of the Laws of Sarawak) they were inadmissible in evidence. This decision was appealed to the Federal Court. The appeal was dismissed.
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It is then following the dismissal of that appeal that the plaintiff now comes before this court seeking the remedies as set out in the statement of claim namely:—

- F 1. A declaration that the Charges Nos. L. 2178/1960, L. 3309/1962, L. 2739/1963 and L. 2740/1963 registered under the provisions of the Land Code (Cap. 81) on the 16th day of June, 1960, 31st August, 1962 and 17th August, 1963, respectively against Kuching Occupation Ticket No. 16727 of 1946 in favour of the defendant, are null and void.
- G 2. An order that the Register of Titles be rectified by deleting the memorial or entry of Charges Nos. L. 2178/1960, L. 3309/1962, L. 2739/1963 and L. 2740/1963 entered on Kuching Occupation Ticket No. 16727 of 1946.
- H 3. An order that the defendant do deliver forthwith the said Kuching Occupation Ticket No. 16727 of 1946 to the plaintiff for rectification by the Registrar of Titles.
4. An order that the Registrar of Titles be directed to make the said rectification forthwith.
- I 5. Costs.
6. Any other relief which the court thinks fit.

The basic facts as set out in paragraphs 1, 2, and 3 of the statement of claim are not in dispute. Indeed, they cannot be. The defen-

dant, in his defence, however, claims that although the memoranda of charges are not admissible in evidence, that fact does not affect the validity of the charges as such. It is upon this basis and particularly following the *dicta* of Sir Campbell Wylie, the then Chief Justice of the High Court in Borneo, as given in his judgment in the decision of the Federal Court in the above-mentioned case, that he has founded a counterclaim and asked for judgment for the capital sums and interest secured by the charges, or for an order that he be entitled to enter into possession, or an order for the sale of the land charged. To this, in his reply and defence to the counterclaim, the defendant whilst denying the amount claimed alleges in substance, that the remedies asked for have been adjudicated upon and it is not open to me to grant them now.

The case then really stands in two parts; the second of which I think turns upon my finding with regard to the first. With regard to the first part the plaintiff claims that the fact that the "documents of debt" i.e. the memoranda of charges, were not registered in accordance with the provisions of section 3 of the Moneylenders Ordinance makes them null and void, and in this respect he has particularly referred me to the decisions in *Bonnard v. Dolt*,⁽²⁾ *Cornelius v. Phillips*,⁽³⁾ *Chapman v. Michaelson*,⁽⁴⁾ *Cohen v. J. Lester Ltd.*⁽⁵⁾ and *Sathappa Chettiar v. Song Chwee Oon*.⁽⁶⁾ I was also referred to the case of *AR. Ve. Palanisamy Servai v. S. V. Lingham*.⁽⁷⁾ Then too, and more particularly was reference made to the judgment of the then Lord President in the decision of the Federal Court in *Phuman Singh v. Kho Kwang Choon*, *supra*. At p. 191 of the report the following passage appears: "... A writing which has not been executed and registered in accordance with these provisions cannot be used to establish the fact of any obligation to pay money to which it relates and, to my mind, that is tantamount to saying that the document is invalid for any purpose for which a court of law would base itself on it if it were valid." Whilst at p. 192 the learned Lord President went on to say "... And from that it follows that as the basis of any claim for money the documents were invalid." And further down on the same page, "... The two statutes are different, and when a single transaction falls within the ambit of both then the provisions of both must be complied with." Reference was also made to the decision of the Court of Appeal of the Supreme Court of Sarawak, North Borneo and Brunei in *Chong Cho v. Lau Kheok Chee*.⁽⁸⁾

Against these authorities the defendant argued that the decision of the Court of Appeal in *Phuman Singh v. Kho Kwang Choon*, *supra*, is not binding beyond the basic facts of that case, namely that the memoranda of charges concerned are inadmissible in evidence. Further did he argue that the judgment of the learned

A Chief Justice appears to indicate that a failure to register a memorandum of charge under the Moneylenders Ordinance would not destroy the legal effect of the agreement between the parties in its entirety and it might well be open for the plaintiff to obtain his remedy by means of some "extraneous" evidence. Then very considerable reliance was placed upon the decision of the the Privy Council in *Frazer v. Walker*⁽⁹⁾ where the principles of "indefeasibility of title", as understood in relation to the Torrens system, was discussed in detail.

C With regard to the English cases quoted by the plaintiff in this case it is necessary to read them in the light of the Moneylenders Act of 1900 and the Moneylenders Act of 1927. The position with regard to these cases was discussed in *Cohen v. J. Lester Limited*, *supra*, where the importance of distinguishing between the words "illegal", "void" and "unenforceable" was discussed. The learned judge in that case went no further than to say that under section 6 of the Moneylenders Act of 1927 a contract made in breach of the relevant provisions of the statute is "unenforceable" by the moneylender. The earlier Singapore and Malayan cases do not take the matter beyond that. As to the judgment of the learned Lord President in *Phuman Singh v. Kho Kwang Choon*, *supra*, I think there is little doubt that he was influenced by the line of cases referred to. This would appear to be particularly so in light of the decision in *Abirami Ammal & Anor. v. M.S.M.M. Meyappa Chettiar*.⁽¹⁰⁾ His views then most certainly tend to support the plaintiff's contention that these memoranda of charges would be unenforceable in all respects despite the fact that the word used in the Moneylenders Ordinance merely refers to the document of debt as not being acceptable as evidence in court. Beyond that I can but say that the decision in *Chong Cho v. Lau Kheok Chee*, *supra*, quite rightly in my opinion, rejects the contention that any secondary evidence is admissible to prove such a loan. It is further a decision by which I am bound.

H However, none of these cases, with the exception of the decision in *Abirami Ammal & Anor. v. M.S.M.M. Meyappa Chettiar*, *supra*, is concerned with the effect upon an interest in land registered under a Land Code, based on the Torrens system, of a failure to comply with the provisions of legislation concerning moneylenders. Indeed even in the excepted instance it does not appear that the court entered upon a consideration of by what right it could order the cancellation of a registered interest, nor in what circumstances it could direct the registrar to make an appropriate amendment in the register of land titles.

Having considered the legislation immediately pertinent to this case, namely the Land Code (Cap. 81, of the Laws of Sarawak), I have

come to the conclusion, and most certainly so in the absence of fraud, that once an interest is registered the court has no power to remove or even order the removal of the name of a proprietor therefrom in the manner here prayed; and here I would add that the plaintiff is a registered 'proprietor' of an interest in land. Sections 132 and 134 appear to make this quite clear. Indeed, it may very well be that in so far as the Land Code of Sarawak is concerned the powers of the court are more restricted than those in New Zealand as there express powers are granted to the courts to interfere and order a rectification by the registrar in the case of fraud. No such direct powers are given under the Land Code and it may well be that the only course open to a person claiming a remedy against a registered proprietor is that provided for by section 136 of the Code, with an ultimate appeal to the court under section 203. But as I have said the question of fraud does not arise here. As to the memoranda of charges themselves, there is no suggestion that they are in any way improperly made out, and I cannot see why the registrar should be compelled to look behind such documents to see whether some provision of law, other than land law, has been complied with before he registers them. In any event the interest is now registered and I do not think for the reasons I have already given that I can grant the remedies prayed.

I am quite aware that in refusing these remedies an unfortunate situation may very well arise. For instance, I can well see difficulties if a mortgagee with an interest prior to that of the defendant in this case obtains an order to sell this land under section 148 of the Land Code. Payment to the defendant may well have to be made by virtue of the provisions of section 151(c) of the Code. But if this was allowed it might necessarily entail an officer of the registry having regard to the memorandum of charge; a document which the court itself could not take cognisance. Then what would be the position if the plaintiff were to transfer his charge for value to another person acting in good faith. Particularly do I realise that the defendant could well be said to be holding the plaintiff to ransom in a manner contrary to those precepts which are basic to all legislation intended to control the activities of moneylenders. In this respect I have very much in mind the reasoning of the learned judge in *Cohen v. J. Lester Ltd.*, *supra*. But on the other hand to adopt any other course would be doing considerable damage to the principle of "indefeasibility of title" which underlines the Land Code: a principle which I think the learned Chief Justice rightly had in mind in the decision of *Phuman Singh v. Kho Kwang Choon*, *supra*, and which was so fully expressed in the case of *Frazer v. Walker*, *supra*.

A The next question which is to be decided before the defendant can even hope to succeed on his counterclaim is what is the nature of a registered charge. Is the entry in the register itself "extraneous" to the memorandum of charge or is the memorandum of charge merely given legal effect as against the land by the act of registration? In this respect I confine myself to "charges" and come to the conclusion that they are in truth one and the same thing. They cannot be separated. Particularly do I notice that under section 144 of the Land Code various matters including interest are "implied" in the charge. But where does one get the rate of interest from unless it is in the memorandum. Similarly with section 146, and particularly subsection (3), the terms of the charge and the memorandum must be read together. Again section 148 of the Code contemplates a failure to observe any agreement expressed or implied in any "charge". It further refers to the length of notice. Such matters clearly are matters set out in the memorandum and nowhere else. Thus do I say they are one and the same thing. This is of particular importance in this case as having so decided it is clear that the "charges" as they appear in the register are not extraneous to the memoranda of charges. They can only be looked upon, at best, as secondary evidence. Indeed even if it were otherwise I think that having regard to the fact that a charge merely makes land a security for the repayment of money it might well be said that it would of itself constitute a "document of debt". Therefore do I think that any such evidence would be inadmissible. This means the evidence which was allowed in the circumstances of this case was inadmissible and no remedy can be granted thereon; and that apart from any question of whether the remedies asked for under section 148 of the Land Code have already been adjudicated upon. And most certainly do I not think that money could be recovered thereon.

In the circumstances, therefore, and despite the fact that I am in truth acknowledging a conflict between the Land Code and the Moneylenders Ordinance, I dismiss the plaintiff's claim and the defendant's counterclaim.

*Claim and counterclaim dismissed.
Costs to defendant and plaintiff
on claim and counterclaim respectively.
Costs to be on higher scale.*